Petition

81-661

NO.

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARLENE SHERER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Whether improper remarks by the prosecutor in rebuttal summation, indicating personal or official belief in guilt or referring to non-evidentiary facts, can be neutralized constitutionally by application of the "harmless error" rule.

2. Assuming that the "harmless error" rule can neutralize constitutionally prosecutorial misconduct in rebuttal summation, did not the United States Court of Appeals for the Eighth Circuit err in applying the rule under the facts of this case?

3. Would not the integrity of the judicial process be enhanced by an opinion from this Court in its supervisory authority over the federal system, providing current guidelines for appellate review of prosecutorial misconduct?

4. Is it not violative of due process for a prosecutor to make improper remarks in rebuttal summation pursuant to the "fair reply" doctrine?

5. Did not the United States Court of Appeals for the Eighth Circuit attach undue significance to the failure of the defense attorney to have moved for a mistrial or, in the instance of certain of the prosecutor's remarks, to have objected?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARLENE SHERER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arlene Sherer, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on July 9, 1981 (Appendix A 1a).

Opinion Below

The opinion of the Court of Appeals for the Eigth Circuit is not yet reported and is printed in full as in the appendix to this Petition (Appendix B 3a to 14a).

Jurisdiction

The Judgment of the Court of Appeals for the Eighth Circuit was entered on July 9, 1981. The jurisdiction of this court is invoked under Title 28, *United States Code*, §1254(1).

Constitutional Provision Involved

Fifth Amendment to the Constitution of the United States (Appendix C 15a).

Statute Involved

Title 18, *United States Code*, §1341 (Appendix D 16a).

Statement of the Case

The petitioner, Arlene Sherer, is a licensed practicing psychiatrist of the State of New Jersey. She was indicted by a federal grand jury in the District of South Dakota and charged with three counts of mail fraud against the State of South Dakota, in violation of 18 *U.S.C.* §1341. Trial before the Honorable Fred J. Nichol and a jury took place on September 30 and October 1, 1980. The jury returned a verdict of guilty on each of the three counts of the indictment. The District Court sentenced Dr. Sherer (who had no prior criminal record) to a $1,000 fine and thirty days imprisonment on Count 1, with a recommendation that she be released during working hours on weekdays.* On Counts 2 and 3, the Petitioner was given pro-

* The recommendation of the District Court was not followed in its entirety. Although Dr. Sherer was permitted work release for three days after commencement of sentence, that permission was rescinded. Dr. Sherer commenced her imprisonment on September 8, 1981.

bation and a total additional fine of $2,000. As a condition of probation, she was ordered to make restitution to the State of South Dakota in the amount of $900.

In a decision filed July 9, 1981, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of conviction. By order of the Honorable Harry A. Blackmun, Circuit Justice for the Eighth Circuit, this Court granted an application to extend time for filing a petition for writ of certiorari until October 7, 1981 (Appendix E 17a).

In March of 1979, Mr. and Mrs. James Caverly, the adoptive parents of Linda Nightpipe Caverly, an Oglala Sioux Indian, sought psychiatric treatment for the child from the petitioner, Dr. Arlene Sherer. The child had been a ward of the State of South Dakota and, at age 13, had been placed for adoption with the Caverlys in their Fanwood, New Jersey, home. The child had pre-existing physical and emotional problems prior to adoption, and as a result, the State of South Dakota had authorized an adoption-subsidy plan whereby it would pay for the medical treatment of the child at the time of adoption.

The indictment alleged in essence that Dr. Sherer had submitted bills to the State of South Dakota which included request for payment on certain dates when medical services in fact had not been provided. Witnesses produced by the Government offered testimony regarding the dates in question, and petitioner, who testified in her own behalf at trial, denied the allegations, contending that she had in fact provided services on the particular dates in question.

During rebuttal summation, the prosecutor stated to the jury:

> Mr. Ulrich: It's my duty as a prosecutor to look at evidence and to bring a case based on sufficient evidence, and I'd just like to assure you that the way our office operates is with diligence and with honesty and we're not out in the business of prosecuting where the evidence does not warrant the case to be indicted.
>
> Now, . . .
>
> Mr. Hoy: Now wait a minute. This is improper argument. Arguing what your office does or might not do has no more relevance than what mine might do or not do.
>
> The Court: Yes, I'm inclined to agree with counsel. I'm going to sustain the objection.

Later, the prosecutor stated:

> [I]t is conceivable that even the best surgeon could be guilty of crimes. In fact, some past Attorney Generals [sic] have entered pleas of guilty to criminal conduct. We've seen in the recent past, even Presidents step down in the face of criminal charges, . . . I asked you early on, do you believe that there's anybody that is above the law, and I got a response from you that there was no one here that had that belief.

Defense counsel did not object to the latter comments of the prosecutor. No motion for mistrial on the basis of the summation or the rebuttal summation was made, and no curative instruction by the District Court judge was requested or given.

REASONS FOR GRANTING THE WRIT

1. The improper remarks in rebuttal summation by the federal prosecutor were offensive to the Due Process Clause of the Fifth Amendment of the United States Constitution and should have served to prevent application of the "harmless error" rule by the Court of Appeals for the Eighth Circuit.

The Assistant United States Attorney told the jury in rebuttal summation that it was his duty as a prosecutor "to look at evidence and to bring a case based on sufficient evidence" and further remarked to the jury that ". . . the way our office operates is with diligence and with honesty and we're not out in the business of prosecuting where the evidence does not warrant the case to be indicted. . . ." Those remarks were patently improper. They suggested that the Government prosecutes only the guilty and that the United States Attorney's office had already determined defendant's guilt based upon evidence known to it and not presented to the jury.

The prosecutor went further and, responding to the summation of the defense counsel who had stressed the fact that the petitioner was a physician, told the jury that ". . . even the best surgeon could be guilty of crimes." He then alluded, inexplicably, to former Attorney General John Mitchell and to former President Richard Nixon (albeit not by name). The comparison of the petitioner to those persons was a transparent appeal to the passions and emotions of the jury. It is reasonably inferrable that the remarks caused the jury to view the petitioner with a sense of betrayal and mistrust. They also reflected the attitude of the United States Attorney's office that Dr. Sherer had, like the Attorney General and the President, betrayed a trust.

The Eighth Circuit, acknowledging that the aforementioned comments were "possibly improper argument," affirmed the conviction, concluding that any error was harmless. (Appendix B 8a). No explanation is contained in the opinion of the court below as to why these remarks were deemed only to be "possibly" improper. It is submitted that they were clearly improper and that if there is any room for discussion it is not with respect to the quality of the words but only their effect.

In *Berger* v. *United States*, 295 U.S. 78 (1935), this Court proclaimed that the federal prosecutor, as the representative of a sovereignty whose obligation is to govern impartially, may be vigorous in his prosecution and may "strike hard blows" but ". . . is not at liberty to strike foul ones" (*Id.* at 88). The Court, speaking through Justice Sutherland, noted that the evidence of guilt had not been strong, and that under the circumstances, prejudice to the accused was highly probable. It was stated, however, that had the evidence been overwhelming, a different conclusion (than that of a new trial) might have been reached. (*Id.* at 89)

Since *Berger*, courts have labored with the concept of the "harmless error" rule and its applicability in various factual situations involving misconduct by prosecutors. It is submitted that the *Berger* decision has generated inconsistency and uncertainty as to when and how to apply the "harmless error" rule. Judge Learned Hand (whose opinion had been reversed in *Berger*) wrote a decision in the same year that *Berger* was decided and, in rejecting the contention that the prosecutor had committed any error in his characterization of the defendant during an income tax fraud case, wrote that "the question is always as to the particular incident challenged, in the setting of the whole trial." *United States* v. *Wechsler*, 79 F.2d. 526, 530 (2d. Cir. 1935).

It has been said that the approach to the "harmless error" rule such as that taken by Judge Hand presumes a great deal. "It places the appellate court in the jury box, and assumes that the mental processes by which the jury analyzed the data were the same as used by the court. . . ." Singer, Forensic Misconduct by Federal Prosecutors—and How It Grew," 20 *Ala. L. Rev.* 227, 232 (1968). Professor Singer points out that a greater danger in employing the "harmless error" rule in criminal cases is that, unable to really know how the jury would have acted had the error not occurred, a reviewing court may forego any effort to determine that matter and may effectually ". . . subsume the jury's processes under its own impression of the case." (*Id.* at p. 233).

Judge Jerome Frank, dissenting in the case of *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 642 (2d Cir. 1946) expressed the view that affirmance in the face of prosecutorial misconduct should occur only if it can be said that a reasonable jury would unquestionably have reached the same verdict in the absence of a violation of propriety. The approaches of Judges Hand and Frank illustrate the extremes of judicial thinking vis-a-vis the "harmless error" rule. But they also serve to illustrate the difficulty that adheres in this area.

Under the "harmless error" rule, courts have affirmed convictions at the same time that they have noted impermissible conduct by the prosecutor. See Alschuler, "Courtroom Misconduct by Prosecutors and Trial Judges," 50 *Texas L. Rev.* 629, 649 (1972), referring to the opinion of the Eighth Circuit in *Baker* v. *United States*, 115 F.2d 533, 543 (8th Cir. 1940) *cert. denied*, 312 U.S. 692 (1941).

Professor Alschuler agrees that there are occasions in which an appellate court may properly affirm while disapproving the prosecutor's conduct. However, he urges

that one of the difficulties with the "harmless error" rule is that it has been applied widely with little recognition of the distinctions in the seriousness of the misconduct. He urges a test for application of the doctrine wherein the court would determine only whether the error itself was harmless. Such determination would obviate efforts, usually fruitless, to determine whether the error had a prejudicial impact and, therefore, should be disregarded because of manifest guilt. He concludes, "it should not be the job of an appellate court to comb through the record and, in effect, convict the defendant itself." (Id. at p. 652). Petitioner agrees with this reasoning and respectfully urges consideration by this Court of the aforestated test for determining harmless error.

It is submitted that the misconduct in the instant case was of a serious nature and served to deprive the petitioner of due process of law. What makes it especially serious is the obvious inability to know with reasonable certainty what effect the remarks had upon the jury. While the Eighth Circuit opines that the evidence of guilt was strong, it acknowledges that the case involved issues of "pure credibility" (Appendix B 8a). What it actually did was substitute itself for the jury. That is the very evil which Professors Singer and Alschuler fear has infused this area and has caused the "harmless error" rule to be of dubious value in certain types of cases such as the present one.

The comments of the prosecutor in this case amounted to constitutional error. Due process is violated when a prosecutor goes beyond the evidence and states or strongly implies that there is other evidence of guilt known to him or to his office that has not been presented. That is what occurred here. And worse, the prosecutor likened the petitioner to Attorney General Mitchell and President Nixon, and in that way could only have intended to inflame

the passions of the jury. The integrity of the judicial process requires a reversal of the conviction in this case so that a trial can be had free of the improper argument (even the Eighth Circuit acknowledged that it was improper) which occurred here. It is submitted that the Fifth Amendment of the Constitution will admit of no less a remedy than a new trial. In the exercise of its supervisory power, this Court should provide new guidelines for determining when prosecutorial misconduct is itself so serious as to necessitate a new trial.

2. It is a denial of due process for a prosecutor to make improper remarks in rebuttal summation pursuant to the doctrine of "fair reply."

Responding to the assertion that rebuttal summation remarks were inflammatory and prejudicial, the Government took the position before the Eighth Circuit that such comments were justified under the "fair reply" doctrine as adopted by the Fifth Circuit Court of Appeals in the case of *United States* v. *Hiett,* 581 F. 2d 1199, 1204 (5th Cir. 1978). The court below agreed with the Government concerning the remarks about the "honesty" and "diligence" of the United States Attorney's office, indicating that such language ". . . was probably fair reply to the defense attorney's closing argument." (Appendix B 8a n.2)

The decision of the court below is devoid of any analysis of the comments alleged to have been prejudicial and to have amounted to a denial of due process. The opinion is couched in doctrinaire terms and avoids the central issue of whether the error was serious by reference to the fact that allegedly there was strong evidence of guilt and to the notion that the prosecutor is somehow justified in replying in kind to wrongful remarks by a defense attorney.

In *United States* v. *Somers,* 496 F.2d 723, 741 (3rd Cir. 1974), *cert. denied,* 419 U.S. 832 (1975), the Court of Appeals for the Third Circuit stated

> The [reply] doctrine serves to permit neutralization of improper defense arguments: it does not operate as a license for improper affirmative attacks upon defendants. Having heard defense counsel's statements, it would have been proper for the Assistant U. S. Attorney to have objected and to have requested an appropriate instruction. It was not proper, however, for the Assistant U. S. Attorney to launch an affirmative charge against [the defendant], especially when the charge inferred matters outside the record.

The court in *Somers* held that the remarks did not constitute reversible error because the trial court had immediately given a stern, curative instruction and because there was ambiguity in the improper remarks of the Assistant United States Attorney. It was not completely clear as to whether the prosecutor was referring to matters not in evidence. (*Id.* at p. 741)

In this case the trial court did not issue an immediate stern instruction to cure the prejudicial effect of the improper prosecutorial remarks. The court merely sustained the objection of defense counsel to the first set of comments. It did not inform the jury that the remark was to be disregarded and that it was improper. Later in its instruction to the jury, the court stated that argument of counsel is not evidence. However, that charge by the court was surely not sufficient to cure the prejudicial impact of the impropriety of the remarks of the prosecutor.

Unlike *Somers,* there was no reasonable ambiguity as to the meaning of the prosecutor's remarks in the present

case. He clearly indicated his personal belief and the belief of his office that Dr. Sherer was guilty. That contention is improper because it does not deal with any evidence in the case. *Berger* v. *United States, supra,* at 88-89.

In *United States* v. *Ludwig,* 508 F.2d. 140 (10th Cir. 1974), the prosecutor had asserted his personal belief as to the integrity of police officers who had testified. The prosecutorial comments occurred after defense counsel had engaged in similar misconduct. The court reversed the defendant's conviction and stated:

> We can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar misconduct by government counsel. The government's remedy, of course, lies with proper objection made to the trial court during the course of trial. (*Id.* at p. 143)

The government in this case made no objection to the remarks of the defense attorney. The Eighth Circuit's opinion amounts to judicial approval of the concept that two wrongs can make a right. It is submitted that the reply doctrine does not and should not allow a prosecutor to take it upon himself to reply in kind to what he views as improper defense conduct. The prosecutor should make known his objection. If the court agrees, the court is fully capable of dealing with defense misconduct.

3. The United States Court of Appeals for the Eighth Circuit attached undue significance to the failure of the defense attorney to have moved for a mistrial or, in the instance of certain of the prosecutor's remarks, to have objected.

The first improper comments by the prosecutor in rebuttal summation referred to the "diligence" and "honesty" of the United States Attorney's office and to the assertion that the prosecutor and his office were not in the business of prosecuting where the evidence did not warrant. Defense counsel objected, and the court sustained the objection. However, no curative instruction was given, and no motion for mistrial was made. The Eighth Circuit noted the absence of a motion for mistrial and, with respect to the remarks about high government officials, noted that there was no objection, concluding that the petitioner ". . . passed up the chance to correct any potentially harmful effect the statement might have on the jury." (Appendix B 9a n. 2)

While not discussed in the decision below, it is apparent that there may have been good reason for the defense attorney not to have objected to the latter comments. To have done so would have served to highlight the prejudicial nature of the remarks. The prosecutor had not committed a technical error of any kind that might reasonably have elicited a technical objection. As stated by United States Court of Appeals for the Fourth Circuit in the case of *United States* v. *Sawyer*, 347 F.2d. 372, 374 (4th Cir. 1965):

> There may be instances where the failure to object to a grave violation manifestly stems from the attorney's fear that an objection will only focus attention on an aspect of the case unfairly prej-

> udicial to his client . . . it is the judge's duty, on his own initiative, to interrupt, admonish the offender, and instruct the jury to disregard the improper argument.

Certainly the absence of a motion for mistrial and, in this instance, even the absence of an objection, should not be the basis for affirmance of a conviction that already was tainted by the improper remarks of the prosecutor. This is all the more true when it is recalled that there exists neither the way to assess the damage that was done nor the impact of the improper remarks upon the jury.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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BARRY H. EVENCHICK,
CRAIG V. O'CONNOR,
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On the Petition.

[APPENDICES FOLLOW]

APPENDIX A

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1008 September Term, 1980

UNITED STATES OF AMERICA,

Appellee,

v.

ARLENE SHERER,

Appellant.

Appeal from the United States District Court for the District of South Dakota.

This cause was heard on a designated record from the United States District Court for the District of South Dakota and was argued by counsel.

After consideration it is now ordered and adjudged that the judgment and commitment of the said District Court

in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

July 9, 1981

A true copy:

Attest:

ROBERT D. ST. VRAIN
Clerk, U. S. Court of Appeals, 8th Circuit
August 7, 1981

APPENDIX B

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1008

UNITED STATES OF AMERICA,

Appellee,

v.

ARLENE SHERER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

Submitted: May 22, 1981

Filed: July 9, 1981

Before GIBSON, Senior Judge, ARNOLD, Circuit Judge, and McMANUS,* District Judge.

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* The Hon. Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

Appendix B

ARNOLD, Circuit Judge.

Arlene Sherer, a New Jersey psychiatrist, was convicted of three counts of mail fraud against the State of South Dakota, in violation of 18 U.S.C. §1341. The District Court[1] sentenced Dr. Sherer to a $1,000 fine and 30 days imprisonment on Count I, with the recommendation that she be released during working hours on weekdays. On Counts II and III the defendant was given probation and a total additional fine of $2,000.00. As a condition of probation, defendant was ordered to make restitution to the State of South Dakota in the amount of $900. She now appeals her conviction, alleging that she was deprived of her right to a fair trial by inflammatory comments by the Assistant United States Attorney during closing argument, by the introduction of evidence of "other crimes," and by the court's failure to charge the jury on the defense of good faith. We affirm.

Dr. Sherer was hired by the State of South Dakota under an adoption-subsidy plan whereby the State paid for treatment of all medical conditions existing at the time a child was placed for adoption. Linda Caverly, a ward of the state, was adopted by Mr. and Mrs. James Caverly in early 1979. In March of 1979 she experienced emotional problems, and the adoption agency referred the Caverlys to Dr. Sherer, a specialist in the treatment of emotional disorders of children and adolescents. The Caverlys and Linda met with Dr. Sherer on March 26, 1979, to discuss Linda's treatment plan. According to the Caverlys' testimony at trial, they agreed on a once-a-week treatment

[1] The Hon. Fred J. Nichol, Senior United States District Judge for the District of South Dakota.

program. Dr. Sherer testified, however, that they all agreed that Linda would have two appointments each week.

Department of Social Services regulations required that Dr. Sherer, as the provider of services, submit for billing purposes each month a form, designated as CS-101, and a statement of services on her letterhead stationery. Mrs. Connie Irwin of the Department of Social Services testified as to each billing form and letterhead statement Dr. Sherer mailed to her. Using Linda's chart, Dr. Sherer testified that she saw Linda 32 times and that Linda did not show up for scheduled appointments on 11 dates. Mrs. Caverly, using her kitchen calendar, testified that Dr. Sherer saw Linda only 14 times. Mr. Caverly and three other witnesses testified that Linda was at camp or on family vacations on four of the dates that Dr. Sherer claimed to have had sessions with her.

The investigation into Dr. Sherer's billing was initiated by Mr. Caverly, an F.B.I. agent, who noticed a discrepancy between the dates billed for April and the dates on which, according to him, Linda had seen Dr. Sherer. He alerted Mrs. Irwin in South Dakota and his superiors in the F.B.I.. In spite of Mrs. Irwin's knowledge of the investigation, she continued to accept Dr. Sherer's statements, and Dr. Sherer was paid for the months of March, April, and May.

Improper Argument

During his closing argument, the Assistant United States Attorney stated:

> Mr. Ulrich: It's my duty as a prosecutor to look at evidence and to bring a case based on sufficient

> evidence, and I'd just like to assure you that the way our office operates is with diligence and with honesty and we're not out in the business of prosecuting where the evidence does not warrant the case to be indicted.
>
> Now, . . .
>
> Mr. Hoy: Now wait a minute. This is improper argument. Arguing what your office does or might not do has no more relevance than what mine might do or not do.
>
> The Court: Yes, I'm inclined to agree with counsel. I'm going to sustain the objection.

Later in his rebuttal argument the Assistant United States Attorney stated that:

> [It] is conceivable that even the best surgeon could be guilty of crimes. In fact, some past Attorney Generals [sic] have entered pleas of guilty to criminal conduct. We've seen in the recent past, even Presidents step down in the face of criminal charges, . . . I asked you early on, do you believe that there's anybody that is above the law, and I got a response from you that there was no one here that had that belief.

Defense counsel did not object to this remark.

Defendant characterizes the first statement as suggesting that the government prosecutes only the guilty. She characterizes the second statement as an inflammatory and irrelevant comparison of herself to Richard Nixon and John Mitchell, with the intended effect of inflaming the passions of the jury. The government seeks to justify its statements as a fair reply to remarks made by defense

counsel in his closing argument. In his summation to the jury, defense counsel argued that the government was trying to make a "federal case" out of what was merely a billing dispute between a doctor and her patient. He suggested that the average person would not get any action if he walked into the United States Attorney's office and said that his doctor was overbilling him. He further argued that the case was not appropriate for a federal court and that the State of South Dakota had plenty of courts and lawyers. He concluded:

> I have spent some time in this courtroom, and I have never ever in my life felt the power of the federal government and the using of the Courts and all the time and energy here to involve themselves in a private matter between a doctor and a patient in New Jersey, that should be handled right there.

We note initially that although defendant is now arguing that the Assistant United States Attorney's remarks were so inflammatory as to deprive her of a fair trial, there was no request for a mistrial when either of the remarks was made, and defendant did not even object to the implied comparison to President Nixon and Attorney General Mitchell.

Several factors lead us to the conclusion that any error committed by the government in closing argument was harmless when viewed in the context of the complete trial. An important factor to consider in determining whether a closing argument is so prejudicial as to require reversal of the conviction is the amount of evidence indicating defendant's guilt. "If the evidence of guilt is overwhelming, an improper argument is less likely to affect the jury verdict. . . . On the contrary, if the evidence of

guilt is weak or tenuous, the existence of prejudice is more easily assumed." *United States* v. *Splain*, 545 F.2d 1131, 1135 (8th Cir. 1076). "Reversal is in order only if the court determines that the jury verdict could reasonabl[y] have been affected by the argument." *Ibid.*

In the present case the testimony of Mr. and Mrs. Caverly and three other witnesses was strong evidence that Linda Caverly was not treated by Dr. Sherer on at least two-thirds of the dates she claimed to have seen Linda. Had Dr. Sherer explicitly raised a defense of mistake or accident, the evidence against her might have been less convincing as to the question of her intent to defraud. She testified, however, that she in fact treated Linda on the dates for which she billed the State, and the jury was left with a pure credibility determination. The jury had to choose whether to believe Dr. Sherer's testimony that Linda was in her office on various dates, or the Caverlys' and other witnesses' testimony that she was at home, at camp, on vacation, or at the circus in New York City. This was hardly a case based on "weak or tenuous" evidence. While we agree with defendant that both challenged statements were possibly improper argument,[2] the

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[2] The Assistant United States Attorney's statement about the honesty and diligence of his office was probably fair reply to the defense attorney's closing argument. While we do not condone statements of personal belief in the guilt of the defendant by a prosecutor, this statement did not rise to that level. Compare the prosecutor's statement in *United States* v. *Splain, supra*: "We are trying to convict Bobby Splain because he committed a crime and we are convinced of that or we wouldn't be trying him." 545 F.2d at 1134. In *Splain* this Court affirmed the conviction

(Footnote continued on following page)

chance is remote that the jury verdict in this cas was influenced by the Assistant United States Attorney's statements.

Since there was no objection to the Assistant United States Attorney's second statement, we ask only if it was so prejudicial as to have "affected substantial rights resulting in a miscarriage of justice." *United States* v. *Big Crow*, 523 F.2d 955, 960-61 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976). Having found that the statement would not merit reversal even if the point had been properly preserved for review, we must conclude that there was no plain error.

JURY INSTRUCTION ON GOOD FAITH

The standard employed by this Court in reviewing the adequacy of instructions is whether the instructions, when taken as a whole, adequately advise the jury of the essential elements of the offenses charged and the burden of proof required of the government. *United States* v. *Brown*,

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(Footnote continued from preceding page)

in spite of the statement of guilt because of overwhelming evidence of guilt and defendant's failure to object to the argument at trial. Because we affirmed Splain's conviction in spite of the patently improper argument, that case, which is relied upon by defendant, presents no basis for reversal of Dr. Sherer's conviction.

The other statement, which implicitly compares Dr. Sherer with disgraced high government officials, is irrelevant and should not have been made. Since defendant did not object, however, she passed up the chance to correct any potentially harmful effect the statement might have on the jury. See *id.* at 1136.

540 F.2d 364, 380-81 (8th Cir. 1976). No instruction was requested on the issue of the defendant's good faith, and none was given. Good faith is a complete defense to a charge of mail fraud, and a defendant is entitled to such a charge if there is evidence to support the theory. *United States* v. *Ammons,* 464 F.2d 414, 417 (8th Cir. 1972), *cert. denied,* 409 U.S. 988 (1972).

Dr. Sherer did not claim that the alleged acts of mail fraud were the result of some mistake in billing procedure or inadvertence on her part or by one of her employees. For each month charged in the indictment, she had submitted a statement on her office letterhead which she personally signed. Her defense was clearly stated in her testimony at trial when she testified that she actually saw Linda in her office on the dates for which she charged, or that, on a few occasions, Linda did not show up for scheduled appointments. The jury had a clear choice of either believing Dr. Sherer's testimony or that of the government's witnesses. The only conceivable good-faith theory which the jury could have inferred from Dr. Sherer's testimony is that Dr. Sherer really believed that she had seen Linda on dates Linda was not in her office. That theory was not argued by defense counsel, whose major theme was that the case was not a proper one for federal prosecution.

The court instructed the jury as follows:

> Now, three essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> First, the act or acts of having devised, or having intended to devise, a scheme or artifice to defraud or to attempt to defraud, the Department

of Social Services for the State of South Dakota, includings its branch office in Brookings, South Dakota, as charged;

Second, the act or acts of placing, or causing to be placed, in an authorized depository for mail matter a letter intended to be sent or delivered by the Post Office Department, as charged; and

Third, the act or acts of so using or causing the use of the United States Mails willfully, and with the specific intent to carry out some essential step in the execution of said scheme or artifice to defraud or to attempt to do so, as charged.

* * *

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statements made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his or her state of mind.

These instructions taken as a whole are adequate for the purpose of any good-faith defense the jury might have inferred from Dr. Sherer's testimony. The essence of a good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring fraud-

ulent intent. The jury was instructed that it must find intent to defraud beyond a reasonable doubt in order to convict. It was also told that a defendant cannot be convicted for an act done because of mistake, accident, or other innocent reason.[3] Under the circumstances of this case, where no instruction on "good faith" as such was requested,[4] there was no reversible error in the instructions given.

"Other Crimes" Evidence

Dr. Sherer also assigns error in the admission of evidence of defendant's billings for the months of August and September. These months were included in the original indictment but were dropped from the superseding indictment under which Dr. Sherer was tried. Pursuant to Fed. R. Evid. 404(b) the government's witnesses were allowed to testify about Linda's treatment schedule for those months. Defense counsel objected. Twice during

---

[3] Earlier in its instructions the court had defined "willfully" as doing an act "voluntarily and intentionally, and with the specific intent to do something the law forbids . . . with the purpose either to disobey or to disregard the law." The jury was further instructed that to do an act "knowingly" is to do it voluntarily and intentionally and not because of mistake or accident or innocent reason and that knowing action is required to "insure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason."

[4] Upon completion of instructions to the jury the court asked defense counsel if he had any objections to any of the instructions. The answer was no. Nor did he voice any request for additional instructions.

the trial and again in the jury instructions the court told the jury that there was no charge of erroneous or fraudulent billing for the months of August and September. It further told the jury that the evidence was allowed not as proof that defendant did anything wrong on those dates, but as evidence of motive, opportunity, intent, plan, or scheme.

The test for admissibility of other acts under Rule 404 (b) is set out in *United States* v. *Lewis*, 423 F.2d 457 (8th Cir. 1970), *cert. denied*, 400 U.S. 905 (1970).[5] Before the evidence can be admitted, however, it must be shown that an issue on which other-crime evidence may be received is raised, the proffered evidence is relevant to that issue, the evidence is clear and convincing, and the probative worth outweighs the probable prejudicial impact. *United States* v. *Clemons*, 503 F.2d 486, 489 (8th Cir. 1974). The billings for August and September meet each of these tests. The issue of intent had been necessarily raised by the plea of not guilty, and the additional months' billings were relevant to show intent, plan, or scheme. There was certainly clear and convincing evidence that false billings were sent. (Dr. Sherer denied any falsehood, but credibility determinations are of course for the jury.) There was little unfairly prejudicial impact, particularly in light of the court's repeated and careful admonitions to the jury. There was no abuse of dis-

---

[5] In *Lewis*, 423 F.2d at 459, we held that "[e]vidence of prior conduct which may constitute a separate crime is admissible and relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one stands to establish the other, and (5) the identity of the person charged with the commission of the crime on trial."

cretion in the admission of the evidence concerning the months of August and September. The judgment is affirmed.

A true copy.
Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

Relevant Constitution Cited

Fifth Amendment to the United States Constitution.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Relevant Statute Cited

Title 18, United States Code, §1341.

CHAPTER 63.—MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX E

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-212

ARLENE SHERER,

Petitioner,

v.

UNITED STATES.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 7, 1981

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of September, 1981

81-661

NO.

Office ... Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARLENE SHERER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Whether improper remarks by the prosecutor in rebuttal summation, indicating personal or official belief in guilt or referring to non-evidentiary facts, can be neutralized constitutionally by application of the "harmless error" rule.

2. Assuming that the "harmless error" rule can neutralize constitutionally prosecutorial misconduct in rebuttal summation, did not the United States Court of Appeals for the Eighth Circuit err in applying the rule under the facts of this case?

3. Would not the integrity of the judicial process be enhanced by an opinion from this Court in its supervisory authority over the federal system, providing current guidelines for appellate review of prosecutorial misconduct?

4. Is it not violative of due process for a prosecutor to make improper remarks in rebuttal summation pursuant to the "fair reply" doctrine?

5. Did not the United States Court of Appeals for the Eighth Circuit attach undue significance to the failure of the defense attorney to have moved for a mistrial or, in the instance of certain of the prosecutor's remarks, to have objected?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARLENE SHERER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arlene Sherer, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on July 9, 1981 (Appendix A 1a).

Opinion Below

The opinion of the Court of Appeals for the Eigth Circuit is not yet reported and is printed in full as in the appendix to this Petition (Appendix B 3a to 14a).

Jurisdiction

The Judgment of the Court of Appeals for the Eighth Circuit was entered on July 9, 1981. The jurisdiction of this court is invoked under Title 28, *United States Code*, §1254(1).

Constitutional Provision Involved

Fifth Amendment to the Constitution of the United States (Appendix C 15a).

Statute Involved

Title 18, *United States Code*, §1341 (Appendix D 16a).

Statement of the Case

The petitioner, Arlene Sherer, is a licensed practicing psychiatrist of the State of New Jersey. She was indicted by a federal grand jury in the District of South Dakota and charged with three counts of mail fraud against the State of South Dakota, in violation of 18 *U.S.C.* §1341. Trial before the Honorable Fred J. Nichol and a jury took place on September 30 and October 1, 1980. The jury returned a verdict of guilty on each of the three counts of the indictment. The District Court sentenced Dr. Sherer (who had no prior criminal record) to a $1,000 fine and thirty days imprisonment on Count 1, with a recommendation that she be released during working hours on weekdays.* On Counts 2 and 3, the Petitioner was given pro-

* The recommendation of the District Court was not followed in its entirety. Although Dr. Sherer was permitted work release for three days after commencement of sentence, that permission was rescinded. Dr. Sherer commenced her imprisonment on September 8, 1981.

bation and a total additional fine of $2,000. As a condition of probation, she was ordered to make restitution to the State of South Dakota in the amount of $900.

In a decision filed July 9, 1981, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of conviction. By order of the Honorable Harry A. Blackmun, Circuit Justice for the Eighth Circuit, this Court granted an application to extend time for filing a petition for writ of certiorari until October 7, 1981 (Appendix E 17a).

In March of 1979, Mr. and Mrs. James Caverly, the adoptive parents of Linda Nightpipe Caverly, an Oglala Sioux Indian, sought psychiatric treatment for the child from the petitioner, Dr. Arlene Sherer. The child had been a ward of the State of South Dakota and, at age 13, had been placed for adoption with the Caverlys in their Fanwood, New Jersey, home. The child had pre-existing physical and emotional problems prior to adoption, and as a result, the State of South Dakota had authorized an adoption-subsidy plan whereby it would pay for the medical treatment of the child at the time of adoption.

The indictment alleged in essence that Dr. Sherer had submitted bills to the State of South Dakota which included request for payment on certain dates when medical services in fact had not been provided. Witnesses produced by the Government offered testimony regarding the dates in question, and petitioner, who testified in her own behalf at trial, denied the allegations, contending that she had in fact provided services on the particular dates in question.

During rebuttal summation, the prosecutor stated to the jury:

> Mr. Ulrich: It's my duty as a prosecutor to look at evidence and to bring a case based on sufficient evidence, and I'd just like to assure you that the way our office operates is with diligence and with honesty and we're not out in the business of prosecuting where the evidence does not warrant the case to be indicted.
>
> Now, . . .
>
> Mr. Hoy: Now wait a minute. This is improper argument. Arguing what your office does or might not do has no more relevance than what mine might do or not do.
>
> The Court: Yes, I'm inclined to agree with counsel. I'm going to sustain the objection.

Later, the prosecutor stated:

> [I]t is conceivable that even the best surgeon could be guilty of crimes. In fact, some past Attorney Generals [sic] have entered pleas of guilty to criminal conduct. We've seen in the recent past, even Presidents step down in the face of criminal charges, . . . I asked you early on, do you believe that there's anybody that is above the law, and I got a response from you that there was no one here that had that belief.

Defense counsel did not object to the latter comments of the prosecutor. No motion for mistrial on the basis of the summation or the rebuttal summation was made, and no curative instruction by the District Court judge was requested or given.

REASONS FOR GRANTING THE WRIT

1. The improper remarks in rebuttal summation by the federal prosecutor were offensive to the Due Process Clause of the Fifth Amendment of the United States Constitution and should have served to prevent application of the "harmless error" rule by the Court of Appeals for the Eighth Circuit.

The Assistant United States Attorney told the jury in rebuttal summation that it was his duty as a prosecutor "to look at evidence and to bring a case based on sufficient evidence" and further remarked to the jury that ". . . the way our office operates is with diligence and with honesty and we're not out in the business of prosecuting where the evidence does not warrant the case to be indicted. . . ." Those remarks were patently improper. They suggested that the Government prosecutes only the guilty and that the United States Attorney's office had already determined defendant's guilt based upon evidence known to it and not presented to the jury.

The prosecutor went further and, responding to the summation of the defense counsel who had stressed the fact that the petitioner was a physician, told the jury that ". . . even the best surgeon could be guilty of crimes." He then alluded, inexplicably, to former Attorney General John Mitchell and to former President Richard Nixon (albeit not by name). The comparison of the petitioner to those persons was a transparent appeal to the passions and emotions of the jury. It is reasonably inferrable that the remarks caused the jury to view the petitioner with a sense of betrayal and mistrust. They also reflected the attitude of the United States Attorney's office that Dr. Sherer had, like the Attorney General and the President, betrayed a trust.

The Eighth Circuit, acknowledging that the aforementioned comments were "possibly improper argument," affirmed the conviction, concluding that any error was harmless. (Appendix B 8a). No explanation is contained in the opinion of the court below as to why these remarks were deemed only to be "possibly" improper. It is submitted that they were clearly improper and that if there is any room for discussion it is not with respect to the quality of the words but only their effect.

In *Berger* v. *United States*, 295 U.S. 78 (1935), this Court proclaimed that the federal prosecutor, as the representative of a sovereignty whose obligation is to govern impartially, may be vigorous in his prosecution and may "strike hard blows" but ". . . is not at liberty to strike foul ones" (*Id.* at 88). The Court, speaking through Justice Sutherland, noted that the evidence of guilt had not been strong, and that under the circumstances, prejudice to the accused was highly probable. It was stated, however, that had the evidence been overwhelming, a different conclusion (than that of a new trial) might have been reached. (*Id.* at 89)

Since *Berger*, courts have labored with the concept of the "harmless error" rule and its applicability in various factual situations involving misconduct by prosecutors. It is submitted that the *Berger* decision has generated inconsistency and uncertainty as to when and how to apply the "harmless error" rule. Judge Learned Hand (whose opinion had been reversed in *Berger*) wrote a decision in the same year that *Berger* was decided and, in rejecting the contention that the prosecutor had committed any error in his characterization of the defendant during an income tax fraud case, wrote that "the question is always as to the particular incident challenged, in the setting of the whole trial." *United States* v. *Wechsler*, 79 F.2d. 526, 530 (2d. Cir. 1935).

It has been said that the approach to the "harmless error" rule such as that taken by Judge Hand presumes a great deal. "It places the appellate court in the jury box, and assumes that the mental processes by which the jury analyzed the data were the same as used by the court. . . ." Singer, Forensic Misconduct by Federal Prosecutors—and How It Grew," 20 *Ala. L. Rev.* 227, 232 (1968). Professor Singer points out that a greater danger in employing the "harmless error" rule in criminal cases is that, unable to really know how the jury would have acted had the error not occurred, a reviewing court may forego any effort to determine that matter and may effectually ". . . subsume the jury's processes under its own impression of the case." (*Id.* at p. 233).

Judge Jerome Frank, dissenting in the case of *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 642 (2d Cir. 1946) expressed the view that affirmance in the face of prosecutorial misconduct should occur only if it can be said that a reasonable jury would unquestionably have reached the same verdict in the absence of a violation of propriety. The approaches of Judges Hand and Frank illustrate the extremes of judicial thinking vis-a-vis the "harmless error" rule. But they also serve to illustrate the difficulty that adheres in this area.

Under the "harmless error" rule, courts have affirmed convictions at the same time that they have noted impermissible conduct by the prosecutor. See Alschuler, "Courtroom Misconduct by Prosecutors and Trial Judges," 50 *Texas L. Rev.* 629, 649 (1972), referring to the opinion of the Eighth Circuit in *Baker* v. *United States*, 115 F.2d 533, 543 (8th Cir. 1940) *cert. denied*, 312 U.S. 692 (1941).

Professor Alschuler agrees that there are occasions in which an appellate court may properly affirm while disapproving the prosecutor's conduct. However, he urges

that one of the difficulties with the "harmless error" rule is that it has been applied widely with little recognition of the distinctions in the seriousness of the misconduct. He urges a test for application of the doctrine wherein the court would determine only whether the error itself was harmless. Such determination would obviate efforts, usually fruitless, to determine whether the error had a prejudicial impact and, therefore, should be disregarded because of manifest guilt. He concludes, "it should not be the job of an appellate court to comb through the record and, in effect, convict the defendant itself." (Id. at p. 652). Petitioner agrees with this reasoning and respectfully urges consideration by this Court of the aforestated test for determining harmless error.

It is submitted that the misconduct in the instant case was of a serious nature and served to deprive the petitioner of due process of law. What makes it especially serious is the obvious inability to know with reasonable certainty what effect the remarks had upon the jury. While the Eighth Circuit opines that the evidence of guilt was strong, it acknowledges that the case involved issues of "pure credibility" (Appendix B 8a). What it actually did was substitute itself for the jury. That is the very evil which Professors Singer and Alschuler fear has infused this area and has caused the "harmless error" rule to be of dubious value in certain types of cases such as the present one.

The comments of the prosecutor in this case amounted to constitutional error. Due process is violated when a prosecutor goes beyond the evidence and states or strongly implies that there is other evidence of guilt known to him or to his office that has not been presented. That is what occurred here. And worse, the prosecutor likened the petitioner to Attorney General Mitchell and President Nixon, and in that way could only have intended to inflame

the passions of the jury. The integrity of the judicial process requires a reversal of the conviction in this case so that a trial can be had free of the improper argument (even the Eighth Circuit acknowledged that it was improper) which occurred here. It is submitted that the Fifth Amendment of the Constitution will admit of no less a remedy than a new trial. In the exercise of its supervisory power, this Court should provide new guidelines for determining when prosecutorial misconduct is itself so serious as to necessitate a new trial.

2. It is a denial of due process for a prosecutor to make improper remarks in rebuttal summation pursuant to the doctrine of "fair reply."

Responding to the assertion that rebuttal summation remarks were inflammatory and prejudicial, the Government took the position before the Eighth Circuit that such comments were justified under the "fair reply" doctrine as adopted by the Fifth Circuit Court of Appeals in the case of *United States* v. *Hiett,* 581 F. 2d 1199, 1204 (5th Cir. 1978). The court below agreed with the Government concerning the remarks about the "honesty" and "diligence" of the United States Attorney's office, indicating that such language ". . . was probably fair reply to the defense attorney's closing argument." (Appendix B 8a n.2)

The decision of the court below is devoid of any analysis of the comments alleged to have been prejudicial and to have amounted to a denial of due process. The opinion is couched in doctrinaire terms and avoids the central issue of whether the error was serious by reference to the fact that allegedly there was strong evidence of guilt and to the notion that the prosecutor is somehow justified in replying in kind to wrongful remarks by a defense attorney.

In *United States* v. *Somers,* 496 F.2d 723, 741 (3rd Cir. 1974), *cert. denied,* 419 U.S. 832 (1975), the Court of Appeals for the Third Circuit stated

> The [reply] doctrine serves to permit neutralization of improper defense arguments: it does not operate as a license for improper affirmative attacks upon defendants. Having heard defense counsel's statements, it would have been proper for the Assistant U. S. Attorney to have objected and to have requested an appropriate instruction. It was not proper, however, for the Assistant U. S. Attorney to launch an affirmative charge against [the defendant], especially when the charge inferred matters outside the record.

The court in *Somers* held that the remarks did not constitute reversible error because the trial court had immediately given a stern, curative instruction and because there was ambiguity in the improper remarks of the Assistant United States Attorney. It was not completely clear as to whether the prosecutor was referring to matters not in evidence. (*Id.* at p. 741)

In this case the trial court did not issue an immediate stern instruction to cure the prejudicial effect of the improper prosecutorial remarks. The court merely sustained the objection of defense counsel to the first set of comments. It did not inform the jury that the remark was to be disregarded and that it was improper. Later in its instruction to the jury, the court stated that argument of counsel is not evidence. However, that charge by the court was surely not sufficient to cure the prejudicial impact of the impropriety of the remarks of the prosecutor.

Unlike *Somers,* there was no reasonable ambiguity as to the meaning of the prosecutor's remarks in the present

case. He clearly indicated his personal belief and the belief of his office that Dr. Sherer was guilty. That contention is improper because it does not deal with any evidence in the case. *Berger* v. *United States, supra,* at 88-89.

In *United States* v. *Ludwig,* 508 F.2d. 140 (10th Cir. 1974), the prosecutor had asserted his personal belief as to the integrity of police officers who had testified. The prosecutorial comments occurred after defense counsel had engaged in similar misconduct. The court reversed the defendant's conviction and stated:

> We can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar misconduct by government counsel. The government's remedy, of course, lies with proper objection made to the trial court during the course of trial. (*Id.* at p. 143)

The government in this case made no objection to the remarks of the defense attorney. The Eighth Circuit's opinion amounts to judicial approval of the concept that two wrongs can make a right. It is submitted that the reply doctrine does not and should not allow a prosecutor to take it upon himself to reply in kind to what he views as improper defense conduct. The prosecutor should make known his objection. If the court agrees, the court is fully capable of dealing with defense misconduct.

3. The United States Court of Appeals for the Eighth Circuit attached undue significance to the failure of the defense attorney to have moved for a mistrial or, in the instance of certain of the prosecutor's remarks, to have objected.

The first improper comments by the prosecutor in rebuttal summation referred to the "diligence" and "honesty" of the United States Attorney's office and to the assertion that the prosecutor and his office were not in the business of prosecuting where the evidence did not warrant. Defense counsel objected, and the court sustained the objection. However, no curative instruction was given, and no motion for mistrial was made. The Eighth Circuit noted the absence of a motion for mistrial and, with respect to the remarks about high government officials, noted that there was no objection, concluding that the petitioner ". . . passed up the chance to correct any potentially harmful effect the statement might have on the jury." (Appendix B 9a n. 2)

While not discussed in the decision below, it is apparent that there may have been good reason for the defense attorney not to have objected to the latter comments. To have done so would have served to highlight the prejudicial nature of the remarks. The prosecutor had not committed a technical error of any kind that might reasonably have elicited a technical objection. As stated by United States Court of Appeals for the Fourth Circuit in the case of *United States* v. *Sawyer*, 347 F.2d. 372, 374 (4th Cir. 1965):

> There may be instances where the failure to object to a grave violation manifestly stems from the attorney's fear that an objection will only focus attention on an aspect of the case unfairly prej-

> udicial to his client . . . it is the judge's duty, on his own initiative, to interrupt, admonish the offender, and instruct the jury to disregard the improper argument.

Certainly the absence of a motion for mistrial and, in this instance, even the absence of an objection, should not be the basis for affirmance of a conviction that already was tainted by the improper remarks of the prosecutor. This is all the more true when it is recalled that there exists neither the way to assess the damage that was done nor the impact of the improper remarks upon the jury.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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BARRY H. EVENCHICK,
CRAIG V. O'CONNOR,
Of Counsel and
On the Petition.

[APPENDICES FOLLOW]

APPENDIX A

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1008 September Term, 1980

UNITED STATES OF AMERICA,

Appellee,

v.

ARLENE SHERER,

Appellant.

Appeal from the United States District Court for the District of South Dakota.

This cause was heard on a designated record from the United States District Court for the District of South Dakota and was argued by counsel.

After consideration it is now ordered and adjudged that the judgment and commitment of the said District Court

in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

July 9, 1981

A true copy:

Attest:

ROBERT D. ST. VRAIN
Clerk, U. S. Court of Appeals, 8th Circuit
August 7, 1981

APPENDIX B

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1008

UNITED STATES OF AMERICA,

Appellee,

v.

ARLENE SHERER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

Submitted: May 22, 1981

Filed: July 9, 1981

Before GIBSON, Senior Judge, ARNOLD, Circuit Judge, and McMANUS,* District Judge.

---

* The Hon. Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

Appendix B

ARNOLD, Circuit Judge.

Arlene Sherer, a New Jersey psychiatrist, was convicted of three counts of mail fraud against the State of South Dakota, in violation of 18 U.S.C. §1341. The District Court[1] sentenced Dr. Sherer to a $1,000 fine and 30 days imprisonment on Count I, with the recommendation that she be released during working hours on weekdays. On Counts II and III the defendant was given probation and a total additional fine of $2,000.00. As a condition of probation, defendant was ordered to make restitution to the State of South Dakota in the amount of $900. She now appeals her conviction, alleging that she was deprived of her right to a fair trial by inflammatory comments by the Assistant United States Attorney during closing argument, by the introduction of evidence of "other crimes," and by the court's failure to charge the jury on the defense of good faith. We affirm.

Dr. Sherer was hired by the State of South Dakota under an adoption-subsidy plan whereby the State paid for treatment of all medical conditions existing at the time a child was placed for adoption. Linda Caverly, a ward of the state, was adopted by Mr. and Mrs. James Caverly in early 1979. In March of 1979 she experienced emotional problems, and the adoption agency referred the Caverlys to Dr. Sherer, a specialist in the treatment of emotional disorders of children and adolescents. The Caverlys and Linda met with Dr. Sherer on March 26, 1979, to discuss Linda's treatment plan. According to the Caverlys' testimony at trial, they agreed on a once-a-week treatment

[1] The Hon. Fred J. Nichol, Senior United States District Judge for the District of South Dakota.

program. Dr. Sherer testified, however, that they all agreed that Linda would have two appointments each week.

Department of Social Services regulations required that Dr. Sherer, as the provider of services, submit for billing purposes each month a form, designated as CS-101, and a statement of services on her letterhead stationery. Mrs. Connie Irwin of the Department of Social Services testified as to each billing form and letterhead statement Dr. Sherer mailed to her. Using Linda's chart, Dr. Sherer testified that she saw Linda 32 times and that Linda did not show up for scheduled appointments on 11 dates. Mrs. Caverly, using her kitchen calendar, testified that Dr. Sherer saw Linda only 14 times. Mr. Caverly and three other witnesses testified that Linda was at camp or on family vacations on four of the dates that Dr. Sherer claimed to have had sessions with her.

The investigation into Dr. Sherer's billing was initiated by Mr. Caverly, an F.B.I. agent, who noticed a discrepancy between the dates billed for April and the dates on which, according to him, Linda had seen Dr. Sherer. He alerted Mrs. Irwin in South Dakota and his superiors in the F.B.I.. In spite of Mrs. Irwin's knowledge of the investigation, she continued to accept Dr. Sherer's statements, and Dr. Sherer was paid for the months of March, April, and May.

Improper Argument

During his closing argument, the Assistant United States Attorney stated:

> Mr. Ulrich: It's my duty as a prosecutor to look at evidence and to bring a case based on sufficient

> evidence, and I'd just like to assure you that the way our office operates is with diligence and with honesty and we're not out in the business of prosecuting where the evidence does not warrant the case to be indicted.
>
> Now, . . .
>
> Mr. Hoy: Now wait a minute. This is improper argument. Arguing what your office does or might not do has no more relevance than what mine might do or not do.
>
> The Court: Yes, I'm inclined to agree with counsel. I'm going to sustain the objection.

Later in his rebuttal argument the Assistant United States Attorney stated that:

> [It] is conceivable that even the best surgeon could be guilty of crimes. In fact, some past Attorney Generals [sic] have entered pleas of guilty to criminal conduct. We've seen in the recent past, even Presidents step down in the face of criminal charges, . . . I asked you early on, do you believe that there's anybody that is above the law, and I got a response from you that there was no one here that had that belief.

Defense counsel did not object to this remark.

Defendant characterizes the first statement as suggesting that the government prosecutes only the guilty. She characterizes the second statement as an inflammatory and irrelevant comparison of herself to Richard Nixon and John Mitchell, with the intended effect of inflaming the passions of the jury. The government seeks to justify its statements as a fair reply to remarks made by defense

counsel in his closing argument. In his summation to the jury, defense counsel argued that the government was trying to make a "federal case" out of what was merely a billing dispute between a doctor and her patient. He suggested that the average person would not get any action if he walked into the United States Attorney's office and said that his doctor was overbilling him. He further argued that the case was not appropriate for a federal court and that the State of South Dakota had plenty of courts and lawyers. He concluded:

> I have spent some time in this courtroom, and I have never ever in my life felt the power of the federal government and the using of the Courts and all the time and energy here to involve themselves in a private matter between a doctor and a patient in New Jersey, that should be handled right there.

We note initially that although defendant is now arguing that the Assistant United States Attorney's remarks were so inflammatory as to deprive her of a fair trial, there was no request for a mistrial when either of the remarks was made, and defendant did not even object to the implied comparison to President Nixon and Attorney General Mitchell.

Several factors lead us to the conclusion that any error committed by the government in closing argument was harmless when viewed in the context of the complete trial. An important factor to consider in determining whether a closing argument is so prejudicial as to require reversal of the conviction is the amount of evidence indicating defendant's guilt. "If the evidence of guilt is overwhelming, an improper argument is less likely to affect the jury verdict. . . . On the contrary, if the evidence of

guilt is weak or tenuous, the existence of prejudice is more easily assumed." *United States* v. *Splain*, 545 F.2d 1131, 1135 (8th Cir. 1076). "Reversal is in order only if the court determines that the jury verdict could reasonabl[y] have been affected by the argument." *Ibid.*

In the present case the testimony of Mr. and Mrs. Caverly and three other witnesses was strong evidence that Linda Caverly was not treated by Dr. Sherer on at least two-thirds of the dates she claimed to have seen Linda. Had Dr. Sherer explicitly raised a defense of mistake or accident, the evidence against her might have been less convincing as to the question of her intent to defraud. She testified, however, that she in fact treated Linda on the dates for which she billed the State, and the jury was left with a pure credibility determination. The jury had to choose whether to believe Dr. Sherer's testimony that Linda was in her office on various dates, or the Caverlys' and other witnesses' testimony that she was at home, at camp, on vacation, or at the circus in New York City. This was hardly a case based on "weak or tenuous" evidence. While we agree with defendant that both challenged statements were possibly improper argument,[2] the

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[2] The Assistant United States Attorney's statement about the honesty and diligence of his office was probably fair reply to the defense attorney's closing argument. While we do not condone statements of personal belief in the guilt of the defendant by a prosecutor, this statement did not rise to that level. Compare the prosecutor's statement in *United States* v. *Splain, supra*: "We are trying to convict Bobby Splain because he committed a crime and we are convinced of that or we wouldn't be trying him." 545 F.2d at 1134. In *Splain* this Court affirmed the conviction

(Footnote continued on following page)

chance is remote that the jury verdict in this cas was influenced by the Assistant United States Attorney's statements.

Since there was no objection to the Assistant United States Attorney's second statement, we ask only if it was so prejudicial as to have "affected substantial rights resulting in a miscarriage of justice." *United States* v. *Big Crow*, 523 F.2d 955, 960-61 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976). Having found that the statement would not merit reversal even if the point had been properly preserved for review, we must conclude that there was no plain error.

Jury Instruction on Good Faith

The standard employed by this Court in reviewing the adequacy of instructions is whether the instructions, when taken as a whole, adequately advise the jury of the essential elements of the offenses charged and the burden of proof required of the government. *United States* v. *Brown*,

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(Footnote continued from preceding page)

in spite of the statement of guilt because of overwhelming evidence of guilt and defendant's failure to object to the argument at trial. Because we affirmed Splain's conviction in spite of the patently improper argument, that case, which is relied upon by defendant, presents no basis for reversal of Dr. Sherer's conviction.

The other statement, which implicitly compares Dr. Sherer with disgraced high government officials, is irrelevant and should not have been made. Since defendant did not object, however, she passed up the chance to correct any potentially harmful effect the statement might have on the jury. See *id.* at 1136.

540 F.2d 364, 380-81 (8th Cir. 1976). No instruction was requested on the issue of the defendant's good faith, and none was given. Good faith is a complete defense to a charge of mail fraud, and a defendant is entitled to such a charge if there is evidence to support the theory. *United States* v. *Ammons*, 464 F.2d 414, 417 (8th Cir. 1972), *cert. denied*, 409 U.S. 988 (1972).

Dr. Sherer did not claim that the alleged acts of mail fraud were the result of some mistake in billing procedure or inadvertence on her part or by one of her employees. For each month charged in the indictment, she had submitted a statement on her office letterhead which she personally signed. Her defense was clearly stated in her testimony at trial when she testified that she actually saw Linda in her office on the dates for which she charged, or that, on a few occasions, Linda did not show up for scheduled appointments. The jury had a clear choice of either believing Dr. Sherer's testimony or that of the government's witnesses. The only conceivable good-faith theory which the jury could have inferred from Dr. Sherer's testimony is that Dr. Sherer really believed that she had seen Linda on dates Linda was not in her office. That theory was not argued by defense counsel, whose major theme was that the case was not a proper one for federal prosecution.

The court instructed the jury as follows:

> Now, three essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> First, the act or acts of having devised, or having intended to devise, a scheme or artifice to defraud or to attempt to defraud, the Department

of Social Services for the State of South Dakota, includings its branch office in Brookings, South Dakota, as charged;

Second, the act or acts of placing, or causing to be placed, in an authorized depository for mail matter a letter intended to be sent or delivered by the Post Office Department, as charged; and

Third, the act or acts of so using or causing the use of the United States Mails willfully, and with the specific intent to carry out some essential step in the execution of said scheme or artifice to defraud or to attempt to do so, as charged.

• • •

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statements made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his or her state of mind.

These instructions taken as a whole are adequate for the purpose of any good-faith defense the jury might have inferred from Dr. Sherer's testimony. The essence of a good-faith defense is that one who acts with honest intentions cannot be convicted of a crime requiring fraud-

ulent intent. The jury was instructed that it must find intent to defraud beyond a reasonable doubt in order to convict. It was also told that a defendant cannot be convicted for an act done because of mistake, accident, or other innocent reason.[3] Under the circumstances of this case, where no instruction on "good faith" as such was requested,[4] there was no reversible error in the instructions given.

"Other Crimes" Evidence

Dr. Sherer also assigns error in the admission of evidence of defendant's billings for the months of August and September. These months were included in the original indictment but were dropped from the superseding indictment under which Dr. Sherer was tried. Pursuant to Fed. R. Evid. 404(b) the government's witnesses were allowed to testify about Linda's treatment schedule for those months. Defense counsel objected. Twice during

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[3] Earlier in its instructions the court had defined "willfully" as doing an act "voluntarily and intentionally, and with the specific intent to do something the law forbids . . . with the purpose either to disobey or to disregard the law." The jury was further instructed that to do an act "knowingly" is to do it voluntarily and intentionally and not because of mistake or accident or innocent reason and that knowing action is required to "insure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason."

[4] Upon completion of instructions to the jury the court asked defense counsel if he had any objections to any of the instructions. The answer was no. Nor did he voice any request for additional instructions.

the trial and again in the jury instructions the court told the jury that there was no charge of erroneous or fraudulent billing for the months of August and September. It further told the jury that the evidence was allowed not as proof that defendant did anything wrong on those dates, but as evidence of motive, opportunity, intent, plan, or scheme.

The test for admissibility of other acts under Rule 404 (b) is set out in *United States* v. *Lewis*, 423 F.2d 457 (8th Cir. 1970), *cert. denied*, 400 U.S. 905 (1970).[5] Before the evidence can be admitted, however, it must be shown that an issue on which other-crime evidence may be received is raised, the proffered evidence is relevant to that issue, the evidence is clear and convincing, and the probative worth outweighs the probable prejudicial impact. *United States* v. *Clemons*, 503 F.2d 486, 489 (8th Cir. 1974). The billings for August and September meet each of these tests. The issue of intent had been necessarily raised by the plea of not guilty, and the additional months' billings were relevant to show intent, plan, or scheme. There was certainly clear and convincing evidence that false billings were sent. (Dr. Sherer denied any falsehood, but credibility determinations are of course for the jury.) There was little unfairly prejudicial impact, particularly in light of the court's repeated and careful admonitions to the jury. There was no abuse of dis-

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[5] In *Lewis*, 423 F.2d at 459, we held that "[e]vidence of prior conduct which may constitute a separate crime is admissible and relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one stands to establish the other, and (5) the identity of the person charged with the commission of the crime on trial."

cretion in the admission of the evidence concerning the months of August and September. The judgment is affirmed.

A true copy.
Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

Relevant Constitution Cited

Fifth Amendment to the United States Constitution.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Relevant Statute Cited

Title 18, United States Code, §1341.

CHAPTER 63.—MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX E

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-212

ARLENE SHERER,

Petitioner,

v.

UNITED STATES.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 7, 1981

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 9th
day of September, 1981